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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 222

PENSICK & GORDON, INC., a California corporation,
Petitioner,

vs.

CALIFORNIA MOTOR EXPRESS, LTD., a corporation, *et al.*,
Respondents.

Brief of Respondent T.I.M.E. Freight, Inc., a Corporation, in Opposition to Petition for Certiorari.

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Brief of Respondent T.I.M.E. Freight, Inc., a Corporation, in Opposition to Petition for Certiorari.

Statement as to Jurisdiction.

The jurisdiction of the Supreme Court of the United States arises by virtue of 28 U. S. C. A. §1254(1). The facts establishing such jurisdiction are set forth in the printed Transcript of Record in No. 17235 at page 94 and in No. 17380 at pages 192-193.[1] Both appeals were from orders of the District Court dismissing the action for want of jurisdiction and which orders were affirmed by judgment of the United States Court of Appeals dated April 13, 1962. The opinion of the Court of Appeals is printed and attached as Exhibit "A" to Appellant's Petition for a Writ of Certiorari and is reported at 302 F. 2d 391.

[1]Page references to the printed Transcript of Record in the first cause (No. 17235) will be preceded by the designation "1 Tr."; and in the second cause (No. 17380) by "2 Tr." Respondent T.I.M.E. Freight, Inc., may be referred to as "T.I.M.E."

Statement of the Case.

The action as it pertains to Respondent herein is one for damages for alleged breach of duty to Petitioner allegedly imposed upon it as a common carrier of property by motor vehicle pursuant to subdivisions (b) and (d) of §216 of the Interstate Commerce Act, 49 U. S. C. A. §316(b)(d) to make pick-up and delivery of goods at Petitioner's place of business upon reasonable terms and without unjust discrimination.[2]

When the cause was originally commenced, the action called for injunctive relief as well as damages. Hence, the District Court had before it Petitioner's verified Complaint and various affidavits submitted by Petitioner, this and other Respondents before the Court which evidenced the following:

(1) Petitioner, a shipper of toys throughout the various states of the United States, regularly called upon common carriers to pick up and deliver its merchandise. [1 Tr. 5, 6.]

(2) Respondent T.I.M.E. is a motor common carrier of property operating under Certificates of Public Convenience and Necessity, duly issued by the Interstate Commerce Commission, and is engaged in the carriage of general commodities in interstate commerce.

(3) Between October 12 and 18, 1960, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers (Teamsters' Union Local 986) maintained a picket line at Petitioner's place of business in connection with labor difficulties then existing

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[2]Hereafter, when mention is made of §216(b), (d), reference to the Interstate Commerce Act is intended unless the contrary is specifically indicated.

between said Union and Petitioner. [1 Tr. 46; 2 Tr. 88.]

(4) Driver employees of Respondent T.I.M.E. declined to pass through the picket line and perform pick-up or delivery at Petitioner's dock. [1 Tr. 28-30, 40-41, 65-66; 2 Tr. 78-79, 80-82.]

(5) Petitioner asserts the failure to pass through the picket line constitutes an unreasonable practice and is unjust discrimination in service, thus violative of §216(b)(d) of the Interstate Commerce Act and for which Petitioner is entitled to damages.

(6) The Court below held that since the breach arose out of the alleged failure of service caused by Petitioner's own labor dispute, and said breach depends upon the element of reasonableness or unreasonableness of the acts of Respondent's employees (in refusing to cross the picket line)—then this, *per se*, demands the factual determination as to whether or not the carrier failed to provide reasonable service without unjust discrimination as delineated in Part II of the Interstate Commerce Act, §§216(b), (d) (49 U. S. C. A. §§316(b), (d).)

The question of whether or not the District Court had jurisdiction to make such a determination was found by the court below to have come squarely within the periphery limits and purview of this Court's decision in *T.I.M.E. v. United States* (1959), 359 U. S. 464; 3 L. Ed. 2d 952, 79 S. Ct. 904, and by the lower court's decision in *Consolidated Freightways v. United Truck Lines*, 216 F. 2d 543 (9 Cir. 1954); cert. den. 349 U. S. 905 (1955) and the rationale of those cases were held to be directly applicable to the instant case.

Question Presented.

The sole question on appeal is whether the District Court has jurisdiction to hear and determine a controversy involving a shipper's claim for damages against motor common carriers arising out of the carriers' alleged unreasonable practice and alleged unjust discrimination in failing to render pickup and delivery service.

Petitioner asserts jurisdiction under 28 U. S. C. A. §1337 on the ground that the Interstate Commerce Act, Part II (49 U. S. C. §§301-27) expressly authorizes court action for damages for past unjust and unreasonable discrimination in service. Further, jurisdiction is asserted as to Respondent T.I.M.E. in No. 17380 on the ground that such action exists apart from statute and hence may be prosecuted in the District Court under 28 U. S. C. A. §1332 when diversity is demonstrated.

Respondent challenges both grounds of jurisdiction for the reasons and arguments in support thereof as follows.

ARGUMENT.

1. This Court and the United States Court of Appeals Have Held Squarely That There Is No Private Civil Remedy Available Against a Motor Carrier Cognizable in the District Court for Damages Incurred by Reason of Carrier Violation of the Provisions of §216 of the Interstate Commerce Act (49 U. S. C. A. §216).

Summary of the Argument.

Enactment of Part II of the Interstate Commerce Act evidenced determination by Congress to pre-empt control in the field of relationships between interstate motor carriers and shippers. Both this Court and the United States Court of Appeals for the Ninth Circuit have held that no private judicial action will lie for damages for breach by a carrier of the provisions of §§216(b) and (d) of the Interstate Commerce Act (sometimes referred to as the Motor Carrier Act). *T.I.M.E. Inc. v. United States, supra,* and *Consolidated Freightways v. United Trucklines, supra.*

Significantly, Part II contains no provisions expressly granting to a shipper a right to recover damages for unauthorized limitations or discrimination in service. The provisions of said Part II (49 U. S. C. A. §301, *et seq.*) delineate the exclusive remedies for breach of carrier duty established by the Act (§216) and such remedies do not include a private civil action by the shipper against the carrier for damages in the District Court.

1.1 The Decision of This Court and the Court Below Have Already Ruled Adversely to Petitioner on Its Claim That a District Court Had Jurisdiction Under an Act of Congress. Petitioner Bases Its Argument as to Jurisdiction Under 28 U. S. C. A. §1337 as Coming Within the Orbit of §§216(b) and (d) of the Interstate Commerce Act. Neither of Said Sections Authorizes Expressly or Inferentially a Justiciable Legal Right in a Private Shipper for Alleged Failure of Performance by a Carrier of the Requirements as Specified in Said Sections.

The statutory interpretation of the aforesaid sections as urged by Petitioner has been considered and rejected both by this Court and the United States Court of Appeals.

In *T.I.M.E. v. United States,* the Government, as a shipper of goods in interstate commerce, asserted as a defense in post-shipment litigation, the reasonableness of the motor carriers' charges made in accordance with tariffs governing the shipments, as well as an additional defense that the Act at least preserved the pre-existing common law right to recover from a carrier for unreasonable charges paid under protest. The Government conceded that irrespective of the right asserted by it as a defense, the determination of reasonableness or unreasonableness lay within the orbit of Interstate Commerce Commission jurisdiction. The two questions therein involved are identical to the instant litigation: (a) whether a judicially enforceable right arises under the Act; and, if not (b) whether the common law rights, if any, were preserved despite the passage of the Act. This Court concluded in said case, that

"the very provisions of Part I and their counterparts in Part III, which give right of action to shippers against carriers for damages incurred by carrier violations of the Act, and provide the mechanics for the enforcement of that right are conspicuously absent from the Motor Carrier Act. Thus, whereas §8 of Part I provides that '. . . any common carriers subject to the provisions of this chapter (who) shall do . . . any act . . . . in this chapter . . . declared to be unlawful . . . shall be liable to the person or persons injured thereby for the full amount of the damages sustained . . .'. Part II has no comparable provision. Again, whereas §9 of Part I gives the injured shipper the right to sue in the I.C.C. or in the Federal District Court, Part II contains no comparable provisions." (359 U. S. at 466-471).

Then again this Court opined at page 471:

"We find it impossible to impute to Congress an intention to give such a right to shippers under the Motor Carrier Act when the very sections which establish that right in Part I were wholly omitted in the Motor Carrier Act" (p. 471).

In the *Consolidated Freightways* case, in discussing the same subject, the following language was used by the Ninth Circuit Court below:

"In contrast with Part I, Part II is silent as to any private remedy for a violation of any of its provisions. This omission is significant, and persuades us that Part II is to be regarded as wholly independent legislative enactment in which Congress deliberately elected to provide no remedies

for violation of any of its provisions other than those carefully spelled out in Part II itself." (215 F. 2d at 545.)

The standard of "reasonableness" as applied in the *T.I.M.E.* case as to tariff charges, applies equally to the obligation to provide service and Petitioner respectfully submits that §§216(b) and (d) cannot have one meaning in reference to discrimination in rates and another as to discrimination in service. The standards of reasonableness as established by the sections of the Act create the criteria for administrative application and not justiciable legal rights. *Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Co.*, 341 U. S. 246, 251; 359 U. S. at 469-470.

Even the Interstate Commerce Commission itself has recognized the absence of a private remedy for violation of the Act and upon two occasions recommended amendatory legislation has been rejected by Congress. (*T.I.M.E.* case *supra*, 359 U. S. at 471.)

It is to be noted that in a recent decision, the United States Court of Appeals for the Second Circuit, held that the rule announced in the *T.I.M.E* case is equally applicable where the question in issue is reasonableness of practices of motor carriers as when the question is reasonableness of rates. *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 293 F. 2d 205 (C. A. 2, 1961). (Cert. granted, 368 U. S. 915.)

2. Enactment of Part II of the Interstate Commerce Act, §216(b), (d) Thereof Destroyed Any Common Law Action Which May Have Theretofore Existed for Failure of a Carrier to Provide Reasonable Service Without Unjust Discrimination and/or Prejudice; Remedies Provided for in the Interstate Commerce Act Are Exclusive of All Other Remedies.

Summary of the Argument.

The Interstate Commerce Act, Part II, precludes rights or remedies inconsistent with §216. The requirement of carrier conduct as prescribed in the aforesaid Section is that the same shall be reasonable and non-discriminatory with respect to all matters affecting transportation and as to all persons, places and traffic. The Interstate Commerce Act, as Congress intended undertook to set forth a comprehensive and all-inclusive scheme for the Federal regulation of common motor carriers, and the Interstate Commerce Commission is vested with the exclusive competence to determine whether or not carrier conduct is reasonable and non-discriminatory in particular instances. Adjudication of the question herein involved by the District Court would necessarily come within the periphery limits of judicial determination as to whether or not carrier conduct was reasonable and non-discriminatory within §216. Hence, such a determination would be inconsistent with the statutory plan and thus by virtue of pre-emption on the part of Congress in the field the cause and remedy were correspondingly extinguished by the statutory enactment.

2.1 The Comprehensive and All-Inclusive Regulatory Scheme Contained in Part II Precludes Survivial of the Common Law Action Which Petitioner Seeks to Assert.

In the *T.I.M.E* case, *supra,* the shipper therein conceded that primary jurisdiction to adjudicate the question of reasonableness rested with the Interstate Commerce Commission and postulated the contention that *after* the Commission found conduct unreasonable, it then should be allowed to recover damages in the judicial action for the wrong so *determined by the Commission to exist by virtue of the general language in §216(j) of the Interstate Commerce Act providing that nothing in §216 ". . . shall be held to extinguish any remedy or right of action not inconsistent therewith."* 46 U. S. C. A. §316(j).

In rejecting this contention, this Court opined:

> ". . . the question is, of course, one of statutory intent. We do not think that Congress, which we cannot assume was unaware of the holding of the Abilene case (*Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553 (1907)) that a common law right of action to recover unreasonable common carrier charges is incompatible with a statutory scheme in which the Courts have no authority to adjudicate the primary question in issue, intended by the savings clause of §216(j) to sanction a procedure such as that here proposed". (Emphasis added)

It is respectfully submitted that the *T.I.M.E.* case must be construed as holding that a common law action

does not survive for the enforcement of carrier obligations described in §§216(b) and (d); and further, that a right of judicial action does not survive even though there is no right of reparation provided for in Part II of the Interstate Commerce Act.

The Interstate Commerce Act provides for substantive rights and remedies for their enforcement; the remedies concerned in Part I include a right of action by a shipper against a carrier both in Courts and before the Commission to recover damages for breach of carrier obligations.

> *Interstate Commerce Act*, §§216(e) (49 U. S. C. A. §316(3)).

As explained in the opinion of this Court in the *T.I.M.E* case, Congress saw fit to eliminate the remedy of an action for damages for past unreasonable conduct both in the Court and before the Commission from the provisions of Part II. There are, however, other remedies for enforcement of carrier obligations as set forth in the Act, pertaining to motor carriers and the shipper is not without a remedy for the protection of his interests.

Upon shipper complaint, or upon its own motion, the Commission may declare carrier conduct violative of the Act and order compliance with the statutory provisions.

> *Interstate Commerce Act*, §216(e) (49 U. S. C. A. §316(3)).

On its motion or upon request of a shipper, the Commission can avail itself of the injunctive processes of the Federal Courts to compel the carrier to perform its

statutory obligations to provide reasonable service on a non-discriminatory basis:

> *Interstate Commerce Act*, §204(c) (49 U. S. C. A. §304(c)).

A judicial action is preserved to a shipper if charges are made in excess of those authorized for services performed.

> *Interstate Commerce Act*, §204(a) (49 U. S. C. A. §304(a)).

And finally, there is a specific provision made in Part II with respect to preservation of the right of action of a shipper for breach of the contract of carriage.

> *Interstate Commerce Act*, §219 (49 U. S. C. A. §319) (Incorporating by reference §20(11) and §20(12) of Part I).

To argue as petitioner does that a cause of action for damages must of necessity in law exist in some forum is basically untenable for a shipper has no inherent constitutional right to an action for damages for enforcement of the carrier obligation. In establishing a comprehensive and basic pattern of transportation regulation by virtue of Congressional pre-emption in the field, Congress has simply decided that proper relationships between carriers and shippers may best be preserved and protected if the particular remedy sought by Petitioner is necessarily eliminated. The Congress has determined that the other rights and remedies as statutorily provided to the shipper with reference to its relationships with motor carriers are amply provided and protected and supplied to the said shipper under the provisions of Part II as it now reads.

3. The Decision of the Court Below Does Not Conflict With the Authorities From Other Circuits Relied Upon by Petitioner.

Petitioner asserts that the decision of the Court below conflicts with a substantial number of authorities and cites in support thereof, the following cases:

Meier & Pohlman Furniture Co. v. Gibbons (1956, 8th Cir.), 233 F. 2d. 296 (cert. den. 352 U. S. 879);

Minneapolis, etc. Railway Co. v. Pacific Gamble-Robinson Co., 215 F. 2d 126 (1954);

Merchandise Warehouse Co. v. ABC Freight Forwarding Corp., 165 Fed. Supp. 67 (1958);

Quaker State Motor Parts Co. v. Interstate Motor Freight, et al., 148 Fed. Supp. (1957).

Each of the above-mentioned authorities cited by Petitioner antedate the decision of this Court in *T.I.M.E Inc. v. United States,* and are, therefore, neither controlling nor persuasive; but furthermore, to the extent that said cases may conflict with the *T.I.M.E.* case, they must be deemed to be overruled.

In addition to the foregoing, the basic issue involved in the instant proceeding, to wit, the existence or absence of a legal right cognizable in the courts, was not passed upon in any of the cases cited. And finally, none of the cases cited by Petitioner considered the differences in Part I and Part II with respect to expressly stated shipper rights and remedies, nor did they take cognizance of the legislative history of Part II. These circumstances were deemed controlling in both the *T.I.M.E* case and in the decision of the United States Court of Appeals in *Consolidated Freightways v. United Truck Lines, supra.*

4. Application of the Rule of T.I.M.E., Inc. v. United States Was Correct and the Court Below Has Not Unwarrantedly Extended or Misapplied the Rule.

Petitioner herein contends that "the opinion of the Court of Appeals herein constitutes an unwarranted extension of the rule in *T.I.M.E Inc. v. United States,* supra". Petitioner further asserts that the decision of the Court below has broadened the rules in the *T.I.M.E* case as well as the court's earlier decision in *Texas & Pacific Railway v. Abilene Cotton Oil, supra,* so as to exclude from the court's jurisdiction any cause by a shipper against a motor carrier involving any of the duties enunciated in §216(b) and (d), where there is presented for determination any question of reasonableness whether of action on the part of the Commission, a carrier, a carrier's agents or employees, a shipper or whomsoever. Hence, Petitioner contends that a shipper will no longer be able to sue a motor common carrier in any court on any basis for the reason that no carrier would lack the ingenuity to raise and present for determination at least one pertinent issue involving a determination of the reasonableness or unreasonableness of action on the part of some person or entity in the cause and arising from or referable to the duties enunciated in the subject sections. The consequences which Petitioner claims "will flow" from this decision were not anticipated by the Court of Appeals. (Pet. pp. 15-17.) The hypothetical and somewhat ethereal "consequences" described by Petitioner cannot and do not of necessity follow from the holding in the *T.I.M.E.* case nor can such resultants as described be deemed to be before this Court for consideration.

Hypothetical situations or "conjectured consequences" are not before this Court, and of course, the Court necessarily determines only the issues presented to it. The Court below stated

> "it is not necessary for us to decide, and we do not so decide, that no common law actions have survived the M.C.A., but where, as appellant recognized here,[2] the real issue is whether or not the carrier has failed to provide service to a shipper on reasonable terms and without unjust discrimination, the District Court is without jurisdiction to hear and determine it." (Footnote omitted.)

The grant or denial of Petitioner's request for Writ of Certiorari in this case must turn not on hypothetical questions or probabilities which may ensue as a result of other cases or which may exist in other cases (*Hewitt-Robins, Inc., v. Eastern Freight-ways, Inc.*, No. 37, October, 1962 Term.), but only on the question actually presented to this Court by the record.

Barr v. Matteo (1957), 335 U. S. 171, 2 L. Ed. 2d 179, 78 S. Ct. 204;

Eccles v. Peoples Bank (1948), 333 U. S. 426, 92 L. Ed. 784.

As heretofore stated, Petitioner's argument erroneously presumes that it is legally necessary that a cause of action for damages exist in some forum. As stated in the *Consolidated Freight-ways* case the Circuit Court indicated pre-emption on the part of Congress in the field of control over the motor carrier interstate commerce activities and that Congress placed the exercise of regulatory control within the exclusive jurisdiction of the Interstate Commerce Commission. By such

pre-emption, Congress provided for administrative enforcement of the Interstate Commerce Act and indicated that the Act presented no indication or provision for private suits which might be availed by private litigants to aid the Commission in the enforcement of the Act and rules and regulations promulgated thereunder. And in the *T.I.M.E.* case, this Court in a square holding determined that no private civil remedy is available for violation of §216(b) and (d) of the Interstate Commerce Act, and the very statutory provisions under which Petitioner bases and predicates the jurisdiction of the Court evidences the situation that the standard of "reasonableness" as applied to the *T.I.M.E.* case as to tariff charges, applies equally to the obligation to provide service. Therefore, Petitioner has its right to petition the Interstate Commerce Commission for relief against a carrier's violation of the act under §§204, 216 and 219. Further, the Interstate Commerce Commission has access to the Federal Courts for enforcement of the Act and of its rules promulgated thereunder pursuant to §222(b), (49 U. S. C. A. §322(b)). In *Local 1976 United Brotherhood, etc. v. N. L. R. B.*, 357 U. S. 93, 2 L. Ed. 2d 1186, 78 S. Ct. 1011 (1958) this Court held, in rejecting the contention of the N. L. R. B. urging that the contracts involed therein were invalid as a matter of law because of the legal duties of the carriers to observe just and reasonable practices under Motor Carrier Act §216, on the basis that the carrier duty was one of reasonable service to be measured as a factual matter in each situation which might arise. The foregoing decision is significant as related to the present petition under consideration in that said case holds that

the carrier's duty to provide service is not absolute and refusal to so provide is not *per se* unlawful under the Act but becomes unlawful only if it violates the standards of "reasonableness" established in §216 of the Interstate Commerce Act.

In passing, Respondent motor carriers in the Court below asserted as an entirely separate and sufficient basis for denial of jurisdiction that the District Court lacked jurisdiction by virtue of the fact that it could not decide the case without reaching or invading issues which were solely within the exclusive jurisdiction of the National Labor Relations Board to resolve in the first instance. No direct reference to this contention is noted by Petitioner herein; but inferentially at least (Pet. pp. 10, 19 and 21.) Petitioner alludes to an additional question possibly presented concerning the carrier's duty to render service across a picket line at shipper's place of business. As the Court below determined—"having decided these appeals on the above grounds, we do not find it necessary to pass upon the merits of Appellee's affirmative defense that the District Court was without jurisdiction because the controversy between the parties raised issues which are within the exclusive primary jurisdiction of the National Labor Relations Board." And the "above grounds" being entirely adequate as a basis for its decision it would necessarily follow that to grant Certiorari in order to take up a question of law not considered or passed upon by the Court below would be contrary to the well settled practice of this Court. See *Barr v. Matteo, supra.*

Conclusion.

It is respectfully submitted that an erroneous assumption that a cause of action for damages must legally and necessarily exist in some forum arising out of the right that a shipper may have under the Motor Carrier Act to be served, does not require that there be an inherent and constitutional right to a private judicial remedy for the vindication of the right in addition to the various remedies allowed before the Interstate Commerce Commission as provided for in the Act. Suffice to say, Petitioner has brought before this Court no authority in support for the proposition asserted and significantly enough, this Court has rejected the proposition and the intent of Congress to the contrary, is clearly evidenced from the legislative history of the Interstate Commerce Act. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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